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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-792

NORTHSIDE REALTY ASSOCIATES, INC., and
ED A. ISAKSON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

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April 16, 1976

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PETITION FOR REHEARING

Petitioners, Northside Realty Associates, Inc., and Ed A. Isakson, respectfully move this Court for an Order (1) vacating its denial of the Petition for Writ of Certiorari entered on March 22, 1976,[1] (2) granting this Petition for Rehearing and (3) granting the Writ of Certiorari. As grounds for this Motion, Petitioners state the following:

[1]The Clerk's Notice stated "Mr. Justice White and Mr. Justice Blackmun would grant certiorari."

INTRODUCTORY BACKGROUND

The result of the denial of certiorari in this case is to leave parties in this increasingly active area of civil rights litigation[2] with the following prospects:

In the Fifth Circuit, the Attorney General will allege in the complaint that there has been a denial of rights under the Fair Housing Act raising an issue of general public importance *but will not be required* to prove that allegation as a predicate for the grant of injunctive relief. *United States v. Northside Realty Associates, Inc.*, 474 F.2d 1164 at 1168, (5th Cir. 1973), 501 F.2d 181 (5th Cir. 1974), 518 F.2d 884 (5th Cir. 1975) (hereinafter collectively referred to as "*Northside*").

In the Fourth Circuit, the Attorney General will allege a denial of rights under the Fair Housing Act raising an issue of general public importance *and will be required* to prove that allegation as a predicate for the grant of injunctive relief. *United States v. Hunter*, 459 F.2d 205, 217 (4th Cir. 1972) (hereinafter referred to as "*Hunter*").

In opposing the Petition for Certiorari herein, the Attorney General argued that the facts before the district court could have warranted findings and a factual conclusion that the incidents proved did reflect, under *Hunter* standards, a denial raising an issue of general public importance. Government Memorandum in Opposition, pp. 4-5. Of course, Petitioners did not here argue (*cf.* Government Memorandum, p. 4) that the facts did not justify such findings and conclusion, since this Court

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[2]During the past 15 months the Attorney General has instituted 35 Fair Housing Act cases involving similar issues (information compiled from Department of Justice press releases, January 1975 to date).

does "not try issues of fact *de novo*." *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 381 (1956). However, this Court's denial of certiorari here leaves litigants to perplexity since it cannot be ascertained whether the denial was because the Court (1) agreed with the Fifth Circuit's view of the law in *Northside*, or (2) agreed with the Fourth Circuit's view of the law in *Hunter and* with the Government's contention that the facts would warrant *Hunter* findings and a factual conclusion of a denial raising an issue of general public importance.

Although there is nothing new in the foregoing paragraphs, it may be that the Court was unaware of the consequences of the denial of certiorari and there is now evidence that the lengthy litigation in this case will produce only a continuation of the Government's stereotyped presentations to the district courts which are distortions of both *Northside* and *Hunter*.

MATTERS ARISING SINCE THE PETITION HEREIN WAS FILED AND OTHER MATTERS NOT PREVIOUSLY PRESENTED

On March 25, 1976, the Attorney General filed a complaint[3] in the United States District Court for the District of Columbia, styled *United States v. Brown-Kessler Co., Inc.*, Civil Action No. 76-0486, in which it was alleged (paragraph 6):

> The defendant's conduct described in the preceding paragraph constitutes
>
> (a) A pattern and practice of resistance to the full enjoyment of rights secured by Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*; and

[3]Copy of the complaint is attached hereto as Appendix A.

> (b) A denial to groups of persons of rights granted by Title VIII of the Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.*, which denial raises an issue of general public importance.

Thus, it appears that the Attorney General is continuing to represent to the district courts that the Government will, in these Fair Housing Act cases, actually prove that there was conduct constituting a "denial . . . which raises an issue of general public importance."[4] Of course, if the law were as represented to this Court in the Government's Memorandum in Opposition, or if this Court's denial of certiorari reflected an adoption of *Northside*, the aforesaid allegation would be superfluous and the Attorney General need only by *ipse dixit* affirm that he had made a determination that the facts reflect a denial raising an issue of general public importance.

If the foregoing were not enough to reflect uncertainty as to the law by those who would be thought to know it best, the confusion is made more obvious by the Government's boiler plate pleadings subsequent to the complaint which facilely ask the district courts to make the following conclusion:

> 6. To prevail on the merits, the United States must show that the defendants have either:
>
> a. Engaged in a "pattern or practice" of resistance to the full enjoyment of the right to equal housing opportunity; or
>
> b. Denied rights granted by the Fair Housing Act to a group of persons under circumstances which the

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[4]Such an allegation was made in the complaint in the instant case, filed July 10, 1970 and a like allegation appears in the complaint, filed November 7, 1975, shortly before the Petition for Certiorari was filed in this case, in *United States v. Holmes et al.*, Civil Action No. C75-2171A (D.C.N.D.Ga.).

> Attorney General has determined raise an issue of general public importance. 42 U.S.C. 3613. See *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d at 122-123; *United States v. Northside Realty Associates, Inc.*, 474 F.2d 1164, 1168 (5th Cir. 1973).

U.S. v. Hilton-Sykes, P.H.E.O.H. Rptr. ¶13,727 (M.D.Fla. 1975).[5]

Thus, after alleging it will prove a " 'pattern or practice' of resistance" or a denial raising "an issue of general public importance", the Government subtly shifts its position and asks for a factual finding by the district court as to the existence of a pattern or practice, but avoids proof of "circumstances which . . . raise an issue of general public importance" by maintaining that it is enough that the "Attorney General has determined" such circumstances exist. In so doing, the Government relies upon the Fifth Circuit's decisions in *Bob Lawrence* and *Northside* and fails to note the contrary relevant holding in *Hunter*.

The Government's suggestion (Memorandum In Opposition, p. 5) that district court decisions, such as *United States v. Hughes Memorial Home*, 396 F.Supp. 544 (W.D. Va. 1975), and *United States v. Long*, P.H.E.O.H. Rptr. ¶13,631 (C.D. S.C. 1974), reflect some inclination to follow *Northside* and ignore *Hunter* is not accurate. The Court in *Hughes* actually said (at pp. 550-551) to "prevail on the merits of this action, the United States must

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[5]The quoted conclusion was adopted verbatim by the district court in its decision of September 18, 1975 from the Government's Proposed Findings and Conclusions filed with the Court June 15, 1975. See Appendix B hereto and note that the Government treats *Hunter* as if it did not exist. Although Petitioners do not have in hand more current Government pleadings, it is believed that there has been no change in the Government's representations to district courts.

show that the defendants have either . . . engaged in a pattern or practice of resistance . . . or denied rights . . . which denial raises a question of general public importance", and it relied on *Hunter*.[6] It is true that the court in a later apparent contradiction said that the Attorney General's determination of general public importance is not subject to judicial review, but it is not clear whether the court had in mind the Attorney General's standing to bring suit or what he must prove as a predicate for relief, and it is clear that the court never addressed itself to the conflict between *Hunter* and *Northside* on the latter point. In *Long*, the district court said to "prevail on the merits in this case, the United States must show that the defendants have either . . . engaged in a 'pattern or practice' of resistance . . . or denied rights to a group of persons and the Attorney General has determined that such denial raises an issue of general public importance", and it referred to *Bob Lawrence*, but not at all to *Hunter* apparently because it simply copied the Government's proposed findings of fact and conclusions of law which omitted reference to *Hunter*. See Appendix D hereto. Moreover, even though the district court in *Long*, as did the court in *Hughes*, went ahead to say that the "Attorney General's determination as to an issue of general public importance . . . is not subject to review," it nevertheless proceeded to find facts which it said satisfied "the issue of general public importance," apparently following *Hunter*. (See P.H.E.O.H. Rptr. at p. 14,092). On appeal in *Long*, the Fourth Circuit was not called upon to ad-

[6]The full text of the Government's proposed conclusion, which was adopted verbatim by the district court, appears in Appendix C hereto. The departure from the Government's usual form and the reference to *Hunter* were apparently in deference to the Fourth Circuit forum and reflect awareness of, but no universal obeisance to, *Hunter*.

dress the question of the necessary findings to support the grant of relief and it recited that the district court had actually found that the denial there "raised an issue of general public importance" (P.H.E.O.H. Rptr., pp. 14,634 and 14,635). There is no reason to believe that the district courts of the Fourth Circuit will not follow *Hunter* when that decision is called to their attention.

The Government opposed certiorari in *Hunter* and in this case. In cases such as *Hilton-Sykes*, *Hughes* and *Long*, the assumed overwhelming expertise of the Government produced decisions adopted verbatim from the Government's proposed findings and conclusions without contest of the issue. Decisions of that kind will multiply unless certiorari is granted and the Government and affected parties are authoritatively advised as to the law.

CONCLUSION

It is respectfully urged that the denial of certiorari would leave the law applicable to a burgeoning number of cases unsatisfactorily uncertain; that the Court's previous order should be reconsidered; and that certiorari should be granted.

Respectfully submitted,

HAROLD L. RUSSELL
Counsel for Petitioners

Atlanta, Georgia
April 16, 1976

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

_____

Counsel for Petitioner

BLEED THROUG

CERTIFICATE OF SERVICE

I hereby certify that I am of counsel for Petitioners, Northside Realty Associates, Inc. and Ed A. Isakson, and hereby certify that I have served a true copy of this "Petition for Rehearing" on the following counsel of record for Respondents.

FRANK E. SCHWELB, ESQ.
DAVID T. KELLEY, ESQ.
Fair Housing Section,
Civil Rights Division
U.S. Department of Justice
Constitution Avenue
Washington, D.C. 20530

This 16th day of April, 1976.

HAROLD L. RUSSELL
Of Counsel for Petitioners

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Appendix A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, by its Attorney General c/o The U.S. Department of Justice, Civil Rights Division 9th & Constitution Ave., N.W. Washington, D.C.	)	CIVIL ACTION NO. 76-0486
Plaintiff,	)	*COMPLAINT FOR VIOLATION OF TITLE VIII OF THE CIVIL RIGHTS ACT OF 1968, 42 U.S.C. 3601 et. seq.*
v.	)	
BROWN-KESSLER COMPANY, INC., 4708 Bradley Boulevard Chevy Chase, Maryland	)	
Defendants.	)	

The United States of America, by Edward H. Levi, Attorney General, alleges:

1. This is an action brought by the Attorney General on behalf of the United States pursuant to 42 U.S.C. 3613, seeking relief for violations of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq., as amended* by the Housing and Community Development Act of 1974, Pub. L. No. 93-383, §808 (August 22, 1974).

2. This Court has jurisdiction of this action under 28 U.S.C. 1345 and 42 U.S.C. 3613.

3. Defendant Brown-Kessler Company, Inc. manages the Coronet Hotel Apartments, located at 200 C Street, S.E., Washington, D.C. This defendant is incorporated under the laws of Delaware, but transacts business in Washington, D.C. through its management of said apart-

ments, and is subject to suit in this Court pursuant to 42 U.S.C. 3613.

4. The Coronet Hotel Apartments consist of one hundred six (106) furnished units, all of which are dwellings within the meaning of Title VIII of the Civil Rights Act of 1968.

5. Defendant has maintained a policy and practice of discrimination against men in the operation of the Coronet Hotel Apartments because of sex. This policy and practice has been implemented by discriminating in the terms and conditions of rental of dwellings because of sex. Specifically, defendant has required male tenants to take and pay a substantial charge for maid and linen service as a condition of renting a dwelling, while not imposing such requirement as a condition for renting a dwelling to females. Such conduct is in violation of 42 U.S.C. §3604(b), as amended.

6. The defendant's conduct described in the preceding paragraph constitutes

(a) A pattern and practice of resistance to the full enjoyment of rights secured by Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et. seq.*; and

(b) A denial to groups of persons of rights granted by Title VIII of the Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.*, which denial raises an issue of general public importance.

WHEREFORE, the plaintiff, United States of America, prays that the Court enter an Order enjoining the defendant, its employees, agents and successors and all those in active concert or participation with any of them from:

(a) Engaging in any conduct which has the purpose or effect of denying or abridging any right secured by Title VIII of the Civil Rights Act of 1968 or interfering with the exercise of that right, and

(b) Failing or refusing to take such adequate affirmative steps as may be necessary and appropriate to correct the effects of past unlawful practices described in this Complaint, including the restoration of any victims or groups of victims of unlawful discrimination to their rightful place.

Plaintiff further prays for such additional relief as the interests of justice may require, together with the costs and disbursements of this action.

EDWARD H. LEVI
Attorney General

J. STANLEY POTTINGER
Assistant Attorney General

EARL J. SILBERT
United States Attorney

FRANK E. SCHWELB
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Appendix B

Relevant Portion of Findings and Conclusions Filed by the Government in *Hilton-Sykes*, June 15, 1975.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO.
	)	74-322-CIV-T-H
v.	)	
	)	
HILTON-SYKES RENTAL AGENCY, INC., E. H. SYKES, President, and JOE THOMAS, Rental Agent,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

JOHN L. BRIGGS
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6. To prevail on the merits, the United States must show that the defendants have either:

a. Engaged in a "pattern or practice" of resistance to the full enjoyment of the right to equal housing opportunity; *or*

b. Denied rights granted by the Fair Housing Act to a group of persons under circumstances which the Attorney General has determined raise an issue of general public importance. 42 U.S.C. 3613. See *United States* v. *Bob Lawrence Realty, Inc., supra,* 474 F. 2d at 122-123; *United States* v. *Northside Realty Associates, Inc.,* 474 F. 2d 1164, 1168 (5th Cir. 1973).

Appendix C

Extract from Government's Proposed Findings of Fact and Conclusions of Law In *Hughes*, Filed April 7, 1975

10. To prevail on the merits of this action, the United States must show that the defendants have either:

(a) engaged in a pattern or practice of resistance to the full enjoyment of the right to equal housing opportunity; or

(b) denied rights granted by the Act to a group of persons, which denial raises a question of general public importance. 42 U.S.C. 3613.

See *United States* v. *Hunter, supra; United States* v. *Bob Lawrence Realty Co.*, 474 F. 2d 115, 122-23 (5th Cir. 1973), *cert. den.*, 414 U.S. 826 (1974), and cases there cited.

Appendix D

Relevant Portion of Findings and Conclusions filed by the Government in *United States* v. *Long*, November 15, 1973.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO. 71-1262
	)	
v.	)	
	)	
J. C. LONG, *et al.,*	)	
	)	
Defendants.	)	

PLAINTIFF'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE

JOHN K. GRISSO
United States Attorney

RONALD A. HIGHTOWER
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Of Assistance:

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Law Clerk
SUSAN SHAPIRO
Research Analyst
Civil Rights Division
Department of Justice

12. To prevail on the merits in this case, the United States must show that the defendants have either:

a. engaged in a "pattern or practice" of resistance to the full enjoyment of the right to equal housing opportunity; or

b. denied rights granted by the Fair Housing Act to a group of persons, and the Attorney General has determined that such denial raises and issue of general public importance.

42 U.S.C. 3613. See *United States* v. *Bob Lawrence Realty, Inc., supra,* 474 F. 2d at 122-123, and cases there cited.